FILE COPY

JAN 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 60

WILLIAM J. STRATTON, Secretary of State of the State of Illinois, *Appellant*,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Corporation, *Appellee*.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLANT.

Oscar E. Carlstrom,
Attorney General of Illinois,
Counsel for Appellant.

Bayard Lacey Catron,
Assistant Attorney General,
Of Counsel for Appellant.

PHILLIPS BROS. PRINT.
SPRINGFIELD, ILLINOIS.

(30699—75)

SUBJECT INDEX

	Page
The Statute and Question Involved in this Case....	1-5
The Franchise Tax imposed is not a direct burden on the Interstate Commerce of Appellee.....	5-7
The Appellee is not deprived of any of its Property without due process of Law.....	8-9
The Statute and its application to Appellee does not deprive it of the Equal Protection of the Laws.	9-16
The Cases cited and relied upon by Appellant sustain the Validity of the Statute and the Tax imposed	16-20
The Circuit Court of Appeals apparently did not correctly interpret the Statute imposing the Tax	21-22

INDEX OF CASES

Page

Airway Electric Appliance Corp. vs. Day, 266 U. S. 71 ..... 5, 15

Armstrong vs. Emmerson, 300 Ill., 54..... 3

Baltic Mining Co. vs. Massachusetts, 231 U. S., 68, 82-7 18

Beatrice Creamery Co. vs. Emmerson, 326 Ill., 18... 3

Cheney Bros. Co. vs. Massachusetts, 246 U. S., 147, 154-8 18

Colgate & Co. vs. Emmerson, 326 Ill., 18, 43-4..... 3

Cudahy Packing Co. vs. Hinkle, 278 U. S., 460...5, 20

General Railway Signal Co. vs. Virginia, 246 U. S., 500, 511 .....6, 16, 18

Hanover Ins. Co. vs. Carr, 272 U. S., 414..... 15

Hump Hairpin Mfg. Co. vs. Emmerson, 258 U. S., 290, 294 20

International Paper Co. vs. Massachusetts, 246 U. S., 135, 143-5 5

International Shoe Co. vs. Shartel, 279 U. S., 429.... 16

Looney vs. Crane Co., 245 U. S., 178, 189-190...5, 15, 19

O'Gara Coal Co. vs. Emmerson, 326 Ill., 18, 43-4...3, 20

Royster Guano Co. vs. Virginia, 253 U. S., 412..... 15

Southern Railway Co. vs. Greene, 216 U. S., 415.... 15

Western Union Telegraph Co. vs. Kansas, 216 U. S., 1 .....5, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 98

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, *Appellant,*

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

REPLY BRIEF OF APPELLANT.

I and II.

The Statute and Question Involved in this Case.

Appellee admits that the statement made by appellant correctly states the facts. This statement showed that the assessment of appellee's annual franchise tax was properly made on the basis specified in Section 107, pursuant to the proviso or last clause of Section 105 of the Illinois Corporation Act.

Nevertheless, appellee refers to various other sections of the Act, which appear to have little or no application here and merely tend to confuse the issue. The final result, as stated by appellee on page 4, is that for both foreign and domestic corporations, "the Secretary of State computes their annual franchise taxes as is provided by paragraphs (sections) 105 and 107 of the statute and as set forth in appellant's brief."

Again, under Point I of its argument, appellee discusses certain other provisions of the Corporation Act, which are not applicable to the question involved in this case. In so doing, appellee ignores the proviso in Section 105, which specifically requires that at least the minimum fee provided by Section 107 shall be paid by each corporation which maintains the privilege of doing business in the State.

Section 101 of the Act deals only with the admission fee and additional fees on increases in stock. That section specifically states that such fees are "in addition to the annual franchise fees and taxes hereinafter provided." Therefore, the annual franchise fees were not included therein, as stated parenthetically by appellee.

The case of *Armstrong* vs. *Emmerson*, 300 Ill., 54, dealt with the tax generally imposed at the rate specified in the first part of Section 105, and has no reference to the minimum tax required by the last part of that section, as specified in Section 107. This provision was discussed and applied by the Illinois Supreme Court in the cases of *Colgate & Co.* and *Beatrice Creamery Co.*, which were included in the group of cases reported as *O'Gara Coal Co.* vs. *Emmerson*, 326 Ill., 18, at 43-4, referred to by appellee on page 5 of its statement.

There can be no question as to the true meaning and purpose of the statute. If there were any such question, this Court would of course follow the Illinois Supreme Court in construing the statute which contained the same provisions here involved, except for the change from authorized to issued stock as the basis for computing the tax. The application of the statute on the latter basis was approved by the Illinois Court in those cases, in conformity with the decision of this Court in the *Airway* case.

The provision for a minimum fee or tax is not of a secondary nature, but may more properly be termed a primary or fundamental requirement. This provision does not require that "you must pay more," as supposed by appellee. The preceding provisions of Section 105 in

fact require a corporation to pay more, if the five cent rate on the basis there provided will produce a larger amount of tax. The mere circumstance that it would produce a less amount in this case does not relieve appellee or any other corporation from the payment of at least the minimum fee fixed by Section 107.

The statement of the question involved in this case by appellant is restated in varied form by appellee on page 15 of its argument. The first restatement omits the essential features that the prescribed fees do not vary in direct proportion to the capital stock, and that a maximum limit in the amount of the tax is fixed, which is directly applicable to appellee here.

The second question stated, as to whether the State could discriminate between domestic and foreign corporations, is entirely beside the question here, as the statute applies alike to both domestic and foreign corporations. Furthermore, the statute applies alike to corporations having either a large or small amount of capital stock, within the limits fixed for the amount of stock they are given the privilege of using in the State.

The third question is likewise irrelevant, inasmuch as the statute does not require a foreign corporation to bring any fixed amount of its assets and business into the State, but merely requires any such corporation to pay

at least a limited minimum fee for maintaining the privilege of using its capital stock in the State, which it may exercise as it sees fit during the year.

III.

The Franchise Tax imposed is not a direct burden on the Interstate Commerce of Appellee.

The cases referred to by appellee on this point are not applicable. In the *Western Union Telegraph Co., Looney* v. *Crane Co.* and *International Paper Co. cases,* the statutes imposed a tax computed upon the entire authorized capital stock of foreign corporations, without any restriction or limitation in either the stock or the amount of the tax. Those statutes therefore contained none of the provisions which limited and restricted the effect of statutes approved by this Court in prior cases, and which likewise limit and restrict the operation of the statute in the present case.

Neither was the *Airway* case in any way similar to this case. The statute there was based on authorized capital stock and while it purported to be limited to the proportion used in the State, it was in fact applied to a much larger number of shares than the total amount of issued stock, which necessarily resulted in a direct tax upon the property and business outside of the taxing state. In the *Cudahy Packing Co.* case, the tax was also measured by a large amount of authorized capital stock,

of which only about two-thirds was issued and outstanding. These features clearly distinguish those cases from the present case.

Appellee assumes that the tax here imposed is a direct burden because the amount happens to be larger than it would be if computed on the basis provided in the first part of Section 105. That result is entirely immaterial to the question here considered. The statute imposes a minimum fee or tax in graded amounts for the privilege granted of doing business in the State during the year. There is a reasonable relation between the amount of tax and the value of the privilege granted. The fact that appellee has failed to exercise its privelege to a sufficient extent to produce an equal or greater tax on a different basis does not show any direct burden on its interstate commerce or any invalidity in the tax assessed.

Appellee contends that the case of *General Railway Signal Co.* v. *Virginia,* 246 U. S., 500, is not in point, but fails to show any material distinction. The admission tax there imposed is exactly the same in principle as the tax here for the privilege granted or renewed for the next year. The statutes are identically the same in their purpose and effect.

The Virginia statute fixed no scale of "maximum" taxes, but instead fixed the tax in certain graded amounts, with a limited maximum amount, exactly as the

statute does in the present case. The fact that another provision of the statute here provides for an increase in the tax upon a sufficient exercise of a franchise, does not in any way affect the validity of the minimum tax required to be paid.

Since the tax imposed under the Virginia statute was not a direct burden on interstate commerce, for the reasons there stated, the tax here imposed cannot be deemed a burden. Its effect is not altered by any other provision for computing the tax upon a different basis, which may be made applicable by a greater exercise of the franchise in the taxing state.

IV.

The Appellee is not deprived of any of its Property without Due Process of Law.

The general rule that a state may not levy a tax on property outside its limits is not in question, and the citation of authorities on that point is superfluous. Neither is any citation of authority to this Court required to show that issued capital stock may be properly used as the measure of an excise or franchise tax levied within the authority of a state, although such stock may represent in part property outside the state or interstate commerce.

The statute in the *Western Union Telegraph Co.* case was expressly applied to all the capital of the company everywhere, without any limitation in the amount

or restriction to the reasonable value of the privilege granted by the taxing state. The nature of that case, as well as the other cases cited on this point, have been discussed in connection with the preceding point. They are likewise inapplicable here, for the reasons already pointed out in this brief and by the Court in some of those cases, and no further discussion of them would seem to be required.

The assumption of appellee that its tax should be only $135.21, and that any tax above that amount is a tax on its property and business outside the State, is entirely unjustified. Appellee is seeking to apply to itself a provision of the statute which is expressly made inapplicable to it, in order to avoid a provision which is applicable to it and all other corporations. That provision is that each corporation is required to pay at least the minimum fee or tax which is fixed by Section 107 of the Act.

The provisions of the first part of Section 105, which appellee seeks to apply to itself, do not apply to it or any other corporation unless the amount of tax under those provisions would exceed the minimum fee or tax provided by Section 107. The payment of this minimum fee or tax for the privilege granted of doing business in the State is required of all corporations. The sole question is whether the payment of such a minimum fee or franchise

tax may be required for the privileges granted by the State. The fact that the tax might be less if computed on a different basis has no bearing on this question.

The argument of appellee on this point ignores the fact that the statute provides a minimum excise or franchise tax for the privilege granted of doing business in the State, and that if the franchise is sufficiently used or exercised in the State to produce a larger tax on the basis of such use, then the larger amount must be paid for the exercise of the privilege. The selected measure in each case is merely a matter of convenience in computing the tax for the privileges granted by the State and affords no basis for the assumption that it applies to property outside the State, and in fact it does not do so.

V.

The Statute and its application to Appellee does not deprive it of the Equal Protection of the Laws.

The principal contention of appellee appears to be that the statute discriminates against it, contrary to the equal protection clause of the Fourteenth Amendment. This contention did not receive any support from the Circuit Court and apparently has no foundation in fact.

Appellee refers to discrimination in several ways between corporations, both foreign and domestic, and cites various authorities, but none of them appear to be

in point here. There can be no such discrimination in this case, as the statute applies alike to both foreign and domestic corporations in the same circumstances.

Appellee complains that the statute discriminates against it because it is required to pay the minimum fee for the privilege granted of doing business in the State, while some other corporations which exercise their franchises to a much greater extent, may pay a fee or tax measured by the proportion of capital stock used in the State. This in fact results in a higher tax being paid by such other corporations and certainly would not seem to discriminate against appellee, which pays a less tax in proportion to the capital stock which it has the privilege of using in the State.

Appellee admits that a franchise tax fixed as provided by Section 107 may bear "a fair relation" to the value of the privilege granted to do business, but urges that the fee or tax measured on the basis provided by Section 105 bears "a more true relation" to the value of the franchise (or privilege of doing business). Appellee therefore concludes that a tax should be computed only on the latter basis, as having a more true relation to the value of the privilege and that no tax on any other basis should be imposed.

When appellee admits that the franchise tax imposed in this case may bear a fair relation to the value of the privilege granted of doing business in the State, it concedes that the tax is imposed on a valid basis. It is immaterial that appellee may believe that some other basis for computing a tax bears a more true relation to the value of the privilege granted or exercised. The State is not required to select a method which may be considered the most reasonable and fair basis for computing franchise taxes imposed upon corporations. It is only required to select a method which bears some relation to the value of the privilege granted. It is admitted by appellee that this has been done and if so, the statute is not arbitrary, but is reasonable and valid.

The contention that the statute is discriminatory because it fixes two "bases" for a franchise tax, merely confuses the minimum franchise tax for the privilege granted, with the larger tax which may be imposed upon the exercise of the privilege. These provisions are applicable under different conditions and apply equally in all cases without favor or discrimination in the case of any corporation to which the respective provisions are applicable.

Appellee complains here, as it did in the Court below, that these provisions as applied discriminate against

it and in favor of corporations with a less amount of issued stock. This contention was referred to and answered by the District Court in stating its views in this case. Appellee is apparently irritated by the obvious answer made and clearly misconstrues the views expressed by the Court. Its comment is not justified by the reply or the facts.

The difficulty with appellee here is that it considers this tax essentially as a property tax, or as a tax according to the value of property and business, and not as an excise or franchise tax. For that reason, it insists that the tax should be computed only on the part of its capital employed in the State, without any regard to the amount of capital which it is granted the privilege of using in the State. The value of the privilege granted has a direct relation to the amount of capital which may be used and which may be considered to a reasonable extent in fixing the amount of tax to be paid.

It is urged that most foreign corporations pay a franchise tax upon the basis of the part of their capital represented in the State, but appellee is required to pay on a different basis. In so doing, such corporations in fact pay a larger tax than appellee in proportion to their issued capital stock. This is due to the fact that they use a larger part of their stock in the State, but the payment of larger tax by them affords no ground for any claim of discrimination against appellee.

The State does not require corporations having a large amount of capital to bring more of their property and business into the State than small corporations, but only requires them to pay a reasonably limited amount for the privilege granted of using their capital in local business in the State. The amount of property and business in the State does not determine the amount of the tax in any case, but the issued stock only is considered in determining the value of the privilege granted or exercised in the State.

For example, a corporation having ten times as much capital as appellee, but having the same amount of property and business in Illinois and other states respectively, would be required under Section 105 to pay ten times the amount appellee contends it should pay for having the same amount of property and business in the State. On the other hand, a corporation having the same amount of capital as appellee, and the same amount of property and business in Illinois, but with only one-tenth of the total amount of property and business of appellee, would pay ten times as much tax as appellee contends it should pay under Section 105.

Appellee suggests that its minimum fee or charge for the privilege of doing a local business should not be over $10, the same as the minimum amount payable

by a corporation having capital stock of less than $50,000. In other words, although appellee admits that its issued stock has some relation to the value of the privilege granted to it by the State, it would pay the same fee for such privilege as a corporation having capital stock amounting to less than $50,000. There is certainly no consistency in such a claim.

It is also urged by appellee that as an interstate carrier, it is subject to the Transportation Act and could not abandon or increase its property in Illinois without securing a certificate therefor from the Commission. The regulation of the business of appellee by the Commission, in so far as it pertains to interstate commerce, has no bearing upon the power and authority of the State to grant the right or privilege of doing a local business in the State. The two respective authorities apply to different rights and activities and have no necessary relation to each other.

This case does not involve a question of classification in the sense referred to by appellee. There is no difference in treatment in the case of appellee from other corporations. All of them are required to pay at least the minimum fees fixed by the statute for maintaining the privilege of doing a local business in the State. The fact that some other corporations are re-

quired to pay proportionately larger fees on a different basis for exercising their franchise in the State to a much greater extent than appellee has done, does not affect it and therefore is no ground for complaint.

Appellee quotes from the case of *Royster Guano Co.* vs. *Virginia,* 253 U. S., 412, but that was merely a case of unintentional discrimination between domestic corporations and is in no way applicable here. Neither is the case of *Southern Railway Co.* vs. *Greene,* 216 U. S., 415, in which there was the discrimination of a higher tax against foreign corporations than domestic corporations were required to pay for substantially the same privileges.

The case of *Hanover Ins. Co.* vs. *Carr,* 272 U. S., 414, likewise involved a higher tax on foreign insurance corporations than domestic corporations were required to pay, which is not in question here. Neither is there any question here of requiring foreign corporations to submit to any unconstitutional provision as a condition of being permitted to do a local business, and therefore the quotation on that point from *Looney* vs. *Crane Co.,* 245 U. S., 184, is not applicable here.

The Court in the *Airway* case does not hold that the fee must be measured by the value of the privilege for which it is imposed, but merely states that some rela-

tion to such value is a reasonable requirement, as shown by the quotation from that case by appellee. This statement is construed by appellee to require a "fair relation" to the value of the privilege, which it here urges does not exist. This claim is nullified by appellee's prior admissions on pages 23 and 27, which indicate that such a fair relation does exist between the tax imposed and the privilege granted by the State.

The statute involved in the case of *International Shoe Co.* vs. *Shartel,* 279 U. S. 429, measured a tax for the exercise of the franchise by the proportion of the stock used in the State, in the same way as Section 105 of the Act here measures the tax for the exercise of the franchise in the State. The approval of a tax for such a privilege on that basis has no bearing on the basis of a minimum fee or tax for the privilege of maintaining the right to do business in the State. None of these cases indicates that there is any discrimination against appellee. The statute is applied equally to all corporations and consequently does not deny the equal protection of the laws to appellee or any other corporation.

VI.

The Cases cited and relied upon by Appellant sustain the Validity of the Statute and the Tax imposed.

A special effort is made by appellee to show that the case of *General Railway Signal Co.* vs. *Virginia,*

246 U. S., 500, is not applicable here. The claim that it was an admission tax, and therefore different from the tax here, is not sound. The tax imposed in that case was not only for the privilege of being admitted, but for actually doing a local business in the State. The tax here imposed is for maintaining the privilege of doing a local business and actually doing such business to a limited extent. There is no distinction in principle between the two cases and no reason is shown why the same rule should not apply.

The statement that the tax there was sustained "for lack of a more true and better basis for the tax," suggests a novel ground for sustaining the tax and the statute under which it was imposed. It indicates again appellee's view that the tax here and the statute under which it was imposed should be held invalid, merely for the reason that in such event the tax might be computed on another basis, which appellee conceives to be more fair and equitable. It need hardly be said that the constitutional questions cannot be disposed of upon any such basis of convenience or comparison.

The suggestion also that in this case the "scale of minimums" tends to raise the amount which appellee would otherwise be required to pay under the first provision of Section 105, as a reason for holding the tax

and statute invalid, is of the same character. The right of the State to impose a minimum fee or franchise tax for the privileges granted by it cannot be affected by any other provision of the statute which is intended to impose larger fees upon a greater exercise of the franchise in the State by a corporation.

The fact that the question of the equal protection of the laws did not arise in the cases referred to, as stated by appellee, merely indicates that there was no ground for raising any such question in those cases. The same is true in the present case. The statute is general in its application to all alike in the same circumstances. The situation is not made any different by reason of the fact that the statute provides for computing a fee on the basis of the exercise of the franchise in the State, when it will produce a larger amount than the minimum fees specified.

The maximum limit here in the amount of the tax provided on the minimum fee basis, is the same in principle as the maximum limit provided by the Massachusetts statute, which was applied in the *Baltic Mining Co.* and *Cheney Bros. Co.* cases. The statute here, however, as in the *Signal Co.* case, has further limitations in the tax imposed to certain graduated amounts of issued capital stock, which provide much greater limita-

tions than the mere maximum limit provided by the Massachusetts statute. In fact, that statute made no limitation or restriction in the tax up to $2000, and thus required all corporations having authorized capital stock of $10,000,000 or less to pay a tax measured by the entire authorized amount of their capital stock. The unlimited application of the statute in such cases is evidently the reason for its disapproval in subsequent decisions of this Court.

The provisions of a statute which limit and restrict its operation to a reasonable charge for the privilege granted by the State, thus making it compatible with the constitutional provisions, were referred to by the Court in *Looney* vs. *Crane Co.*, as quoted by appellee, and illustrated by the cases therein cited on this point. Those cases have been discussed in our original brief and were there shown to be applicable to the statute involved in the present case.

Appellee attempts to distinguish some of the cases referred to by us on the ground that they involved domestic corporations, but other cases relied upon to the same effect also involved foreign corporations. The constitutional provisions apply equally to both domestic and foreign corporations, and there is no material distinction in the principle of a minimum fee or franchise

tax in either case. Moreover, the statute here applies to both kinds of corporations alike, for maintaining the same privileges in the State and no distinction can be made on that ground.

The case of *Hump Hairpin Mfg. Co.* vs. *Emmerson,* 258, U. S., 290, which involved the application of a franchise tax to a foreign corporation in Illinois, has been repeatedly approved by this Court and never discredited in any way. The recent decision of the Illinois Court in the *O'Gara Coal Co.* cases, following the decision of this Court ni the *Airway* case and involving a different situation, is not in point or material here. *The Hump Hairpin* case and other cases cited by us showed clearly that the statute does not impose any burden on commerce or violate any constitutional right of appellee.

The case of *Cudahy Packing Co.* vs. *Hinkle,* 278 U. S., 460, imposed both an admission fee and annual franchise tax on the basis of authorized capital stock, without regard to the amount issued or which might be used by the corporation. The statute here is limited to issued stock only, and fixes a small tax within strictly graduated limits, with a very low maximum amount of tax for large corporations. The tax is closely related to the privileges granted and is very reasonable in amount. The statute and the tax imposed have been fully sustained by the decisions of this Court in similar cases.

VII.

The Circuit Court of Appeals apparently did not correctly interpret the Statute imposing the Tax.

Appellee has referred to the quotation by appellant from the opinion of the Circuit Court in this case, as indicating that it had misconceived the nature and effect of the tax. The quotation was taken from the opinion as it appears in the record in this case (R. 53). Even if a change was made in publishing the opinion, as suggested by appellee, that fact does not alter the opinion of record. Moreover, the alleged change indicates an erroneous understanding of the application of the statute, which apparently had a material bearing upon the conclusion of the Court.

The opinion of the Circuit Court would not of course invalidate a correct judgment. The opinion in this case apparently does show, however, that the judgment is based on erroneous grounds and therefore indicates that the judgment itself is erroneous. The grounds of the opinion are fully discussed in our original brief, at pages 21-26, and need not be repeated here.

For the reasons stated in appellant's original brief, and here referred to again, it is most respectfully but earnestly urged that the decision and judgment of the

Circuit Court of Appeals in this case is erroneous and should be reversed and that the decree of the District Court should be affirmed by this Court.

Respectfully submitted,

OSCAR E. CARLSTROM,
Attorney General of Illinois,
Counsel for Appellant.

BAYARD LACEY CATRON,
Assistant Attorney General,
Of Counsel for Appellant.